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No. 06-595

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IN THE

Supreme Court of the United States

TYLER CHASE HARPER, a minor, by and through his parents RON HARPER, *et ux.*, *et al.*,

Petitioners,

v.

POWAY UNIFIED SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUGGESTION OF MOOTNESS

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SUGGESTION OF MOOTNESS

Respondents suggest the Petition for Writ of Certiorari is moot because it concerns the appeal of an interlocutory order which has now merged with the final judgment recently entered by the District Court.

INTRODUCTION

Petitioners Tyler "Chase" Harper and Kelsie Harper have sought review of the Ninth Circuit's decision affirming the District Court's denial of the Harpers' motion for preliminary injunction against Respondent Poway Unified School District ("School") and individual Respondents. The Harpers invoked appellate jurisdiction under 28 U.S.C. § 1292(a)(1), which permits interlocutory appeals from district court orders granting or denying injunctions.

On February 7, 2007, however, the District Court entered final judgment in this case in favor of the Respondents.[1] The District Court dismissed Petitioner Tyler "Chase" Harper's equitable claims as moot due to the fact that Chase has graduated from high school and no longer has standing. The District Court dismissed Chase's damages claims on Eleventh Amendment and qualified immunity grounds. The District Court also granted summary judgment in the Respondents' favor and against Petitioner Kelsie Harper.

Because the final judgment has been entered in the District Court, the interlocutory order at issue before this Court on Petition for Certiorari has now merged with the final judgment, and is moot. Accordingly, the Court should deny the Harpers' petition.

THE DISTRICT COURT ENTERED FINAL JUDGMENT IN FAVOR OF THE RESPONDENTS

A. Procedural Background Leading Up To The Parties' Cross-Motions For Summary Judgment.

On June 2, 2004, Plaintiff and Petitioner Tyler "Chase Harper, a minor, by and through his parents, Ron and Cheryl

1. On the next day, February 8, 2007, the Harpers filed a notice of appeal.

Harper, filed a complaint seeking declaratory and injunctive relief, as well as nominal and punitive damages, based on allegations that Defendants and Respondents violated Chase's constitutional rights when he was detained at school for wearing a t-shirt bearing the words "Homosexuality is shameful. Romans 1:27" on the front and "Be ashamed Our school has embraced what God has condemned" on the back.

On November 4, 2004, the District Court granted in part and denied in part Respondents' motion to dismiss the complaint, dismissing some of Chase's claims, and denying Chase's motion for preliminary injunction. *See Harper v. Poway Unified School District*, 345 F. Supp. 2d 1096 (S.D. Cal. 2004). The only claim dismissed with prejudice was Chase's claim that the Respondents had denied him due process under the Fourteenth Amendment. Chase appealed the District Court's denial of plaintiff's motion for preliminary injunction to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed, and the Harpers then filed the instant Petition.

Meanwhile, in the District Court, an amended complaint was filed on November 17, 2004, adding Kelsie Harper, Tyler Chase Harper's sister, as a plaintiff and reasserting other claims previously dismissed. The District Court, on February 23, 2005, granted in part and denied in part Respondents' motion to dismiss plaintiff's amended complaint, dismissing, *inter alia*, Kelsie K. Harper as a plaintiff based on lack of standing. The District Court subsequently granted leave to file a second amended complaint, which was filed on November 4, 2005, asserting the same claims presented in the first amended complaint and again adding Kelsie K. Harper as a plaintiff.

Petitioners' second amended complaint alleged that Respondents violated Petitioners' rights: (1) to free speech under the First Amendment to the United States Constitution (first cause of action); (2) to free exercise of religion under the First Amendment (second cause of action); (3) under the Equal Protection Clause of the Fourteenth Amendment (third cause of action); (4) to due process of law under the Fourteenth

Amendment (fourth cause of action); (5) under the Establishment Clause of the First Amendment (fifth cause of action); (6) under California Civil Code § 52.1 (sixth cause of action); (7) to free speech under California Education Code § 48950 (seventh cause of action); and (8) to free expression under California Education Code § 48907 (eighth cause of action).

The parties filed cross-motions for summary judgment. While the motions were being briefed, the Ninth Circuit, on April 20, 2006, affirmed the District Court's order denying Petitioners' motion for preliminary injunction. *See Harper v. Poway Unified School District*, 445 F.3d 1166 (9th Cir. 2006). Oral argument on the cross-motions occurred on May 26, 2006, and the motions were taken under submission.

On July 20, 2006, Respondents requested of the District Court that the parties be given the opportunity to file additional briefing on the parties' cross -motions, suggesting that Chase Harper's claims may now be moot due to his recent graduation from Poway High School. The District Court, on July 25, 2006, granted the request, and the parties filed supplemental briefs on the mootness issue. In addition, Chase Harper moved the Court to reconsider its dismissal with prejudice of his Due Process claim.

B. The District Court's Decision on the Parties' Cross-Motions for Summary Judgment and Chase Harper's Motion for Reconsideration.

The District Court issued an opinion on January 24, 2007 dismissing Chase Harper as a plaintiff based upon mootness grounds, denying Kelsie Harper's motion for summary judgment, granting the Respondents' motion for summary judgment as to Kelsie Harper, and denying it as moot with respect to Chase Harper. The District Court also denied Chase Harper's motion for reconsideration of his Due Process claim, which was previously dismissed from the original complaint with prejudice. The decisions by the District Court effectively ended the litigation in the trial court, and the District Court entered judgment on February 7, 2007.

Specifically with respect to Chase Harper, the District Court accepted Chase's concession that his graduation from Poway High School mooted his claims for declaratory and injunctive relief, citing *Cole v. Oroville Union High School Dist.*, 228 F.3d 1092, 1098 (9th Cir. 2000). With respect to Chase's damages claims, the District Court reiterated its previous ruling that the damages claims against the School and individuals acting in their official capacity were barred by the Eleventh Amendment, and that the damages claims against the individuals acting in their individual capacity were barred by the doctrine of qualified immunity. *See Harper*, 345 F. Supp. 2d at 1115-1119.

The remainder of the District Court's order concerned Kelsie Harper's claims. The District Court first explained that the Ninth Circuit's ruling bound it with respect to some claims based upon the law of the case doctrine, citing *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997)(en banc). The District Court then rejected Kelsie's facial challenges to the School's hate speech policies on both overbreadth and vagueness grounds. Then, turning to Kelsie's state law claims, the District Court found no evidence that the Respondents used threats or intimidation to deprive Kelsie of a constitutional right, and also found that Kelsie could not maintain a claim for unfair discipline by the school because she was not disciplined.

With respect to Kelsie's remaining federal claims, the District Court disposed of Kelsie's Free Exercise and Equal Protection claims by relying upon the "law of the case" doctrine. Finally, the District Court thoroughly analyzed Kelsie's Establishment Clause claim, and held that the School's practices were constitutional under all three prongs of the test stated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

DISCUSSION

"It is the duty of counsel to bring to the federal tribunal's attention, '*without delay*,' facts that may raise a question of mootness." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997), emphasis in original, citing *Board of License Comm'rs of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (per curiam).

When an appeal is taken from an interlocutory order, and then the district court enters final judgment while the interlocutory appeal is pending, then generally the interlocutory order merges into final judgment, and the appeal becomes moot. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 314 (1998), citing *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587, 588-589 (1926). More specifically, this Court has dismissed interlocutory appeals from the denials of a motions for temporary injunctions where thereafter the district court has later entered judgment, thus mooting the appeal. *See Shaffer v. Carter*, 252 U.S. 37, 44 (1920); *Pacific Tel. Co. v. Kuykendall*, 265 U.S. 196, 205 (1924).

In this case, Petitioners are asking this Court to review the Ninth Circuit's affirmance of the District Court's denial of a motion for preliminary injunction. A preliminary injunction is a temporary measure intended to furnish provisional protection while awaiting a final ruling on the merits; the order granting or denying preliminary relief may be appealed to prevent irreparable consequence. *See Carson v. American Brands, Inc.*, 450 U.S. 79, 83-86 (1981).

Here, however, the District Court's denial of the Harpers' motion for preliminary injunction has been mooted by the fact that the District Court proceeded to completely adjudicate the Harpers' claims for injunctive and declaratory relief in favor of the School and individual Respondents. Consequently, the interlocutory order denying a preliminary injunction has now merged with the judgment. The merger has rendered moot the question of whether the temporary relief should have been granted in the first instance. Accordingly, the Petition, which asks this Court to consider that interlocutory ruling, should be dismissed as moot.

CONCLUSION

The Petitioner's interlocutory appeal is now moot because judgment has been entered in the District Court. The Court should deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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